1969

State of Utah v. Lavell Robinson : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

- vs. -

LAVELL ROBINSON,
Defendant-Appellant.

Case No.
~~20338~~
11191

APPELLANT'S BRIEF

Appeal from the Judgment of the District Court
of Salt Lake County, Utah
The Honorable Leonard W. Elton, Judge

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STATEMENT OF THE NATURE OF THE CASE

The appellant, Lavell Robinson, appeals from a conviction for driving under the influence of intoxicating liquor rendered by he Honorable Judge Leonard W. Elton in the Third District Court for Salt Lake County.

DISPOSITION IN THE LOWER COURT

The appellant was convicted of driving under the influence of intoxicating liquor by the Honorable Judge Elton and sentenced to forty (40) days in Salt Lake County Jail and fined $299.00. The sentence was suspended upon the payment of $175.00

The Judge in this case wrote a memorandum decision in which he explained, " . . . The court feels that in this case, but for the results of the breath test, the

verdict would have been different. Neither the arresting officer's testimony or the testimony of the officer administering the test as to Defendant's actions would have been sufficient by itself to find the Defendant guilty."

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction in the lower court.

STATEMENT OF THE FACTS

This is a very important case of first impression upon this court involving the question of the admissibility, the validity, and the constitutionality of the breathalyzer test as administered in the case at bar.

The appellant was arrested for driving under the influence of intoxicaing liquor following an accident involving a collision with a vehicle driven by Melvin Stauffer which resulted in over $500.00 damage to the front end of appellant's vehicle. (Court transcript p. 15). Approximately twenty minutes prior to the accident the appellant had consumed two "screwdriver highballs" during a period of approximately one-half hour. Following the arrest, the appellant was told that he could take a breath, blood, or urine test, and that he could refuse to take the tests but upon doing so he might lose his

license for a period of a year (Court transcript p. 12). The appellant therefor consented to take the breath test at the Redwood Station—approximately three-quaters of an hour after the accident had occurred (Court transcript p. 13). The officer conducting the breathalyzer test testified that he obtained a reading of .180 (it is assumed, of course, that he meant he obtained a .180 reading on the machine which is, in reality, .180%.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN ALLOWING THE RESULTS OF THE BREATHALYZER TEST TO BE ADMITTED INTO EVIDENCE SINCE A PROPER FOUNDATION WAS NOT LAID FOR ITS ADMISSION.

Before evidence of the results of a breathalyzer test can be entered into evidence, certain criteria concerning the operation of the machine must be satisfied. It must be shown: (1) That the machine was properly checked and in proper working order at the time of the conducting of the test; (2) that the chemicals used were the correct kind and compounded in the proper proportions; (3) that the subject had nothing in his mouth at the time of the test and that he had eaten no food and taken no drink within fifteen minutes prior to taking the test; (4) that the test was conducted by a qualified operator in the

proper manner. *State v. Baker,* 56 Wash. 846, 355 P. 2d 806, 809 (1960). The court further pointed out that the state must produce *prima facie* evidence that each of the four above requirements have been complied with before the results of a breathalyzer test may be admitted into evidence. The reasons for such precautions by the courts becomes quite obvious when it is realized that the amount of alcohol in the breath necessary to result in a reading of .180% is 1/20,000 cubic centimeter in the entire 52.5 cu. cm. of air in the breathalyzer cylinder. This is so since there is the same amount in one cubic centimeter of blood as there is in 2100 cubic centimeter of breath. Saying there is 18/10,000 cubic centimeter in one cubic centimeter of blood (.180%) means there is that same amount in 2100 cubic centimeter of breath or, in other words, 18/400,000 cubic centimeter in the 52.5 cubic centimeter breathalyzer cylinder. This means that if a person had *absolutely no alcohol in his bloodstream,* the breathalyzer would still register approximately .180% if he had 1/10 cubic centimeter (approximately 1/300 of a fluid oz.) in his mouth at the time of the test.

There was no attempt on the part of the officers to find out if the appellant had used any medication that night nor did they check his mouth at the time of his test. They based their decision in this area merely on the fact that the arresting officer did not observe the defendant vomit. Considering the extremely small amount of alcohol which would need to be in the mouth at the time of the test in order to result in a reading of .180%,

especially when the fact that the appellant wore false teeth which may easily have trapped as much as 1/300 of a fluid oz. inside his mouth prior to the time of the test, the failure of the state to produce prima facie evidence that this requirement was met ruled out the results of the breathalyzer test and prejudicial error resulted since the court based its decision solely on the results of the breathalyzer test, deeming the other evidence completely insufficient to justify a conviction.

Secondly, the fourth requirement, as well as the third requirement, was not met since Officer Jensen was not adequately shown to be a qualified operator merely because he had taken a two week class from officer Gale which included two days work with the breathalyzer. He admitted that he does not know how the machine operates —merely that it does. Officer Jensen and Officer Jensen alone gave these tests to the defendant. The state failed in an attempt to further show the competency of Officer Jensen as an operator. Officer Gale's testimony was only that he had taught the class which Officer Jensen attended. He did not testify as having seen Officer Jensen operate one of these devices, so his testimony that, in his opinion, Officer Jensen was competent to conduct the breathalyzer test, was also insufficient to show prima facie that Officer Jensen was a qualified individual or that he conducted the test in the proper manner.

POINT II

THE DISTRICT COURT ERRED IN ALLOWING THE RESULTS OF THE BREATHALYZER TEST TO BE ADMITTED INTO EVIDENCE SINCE THE PROSECUTION FAILED TO EXTRAPOLATE THE RESULTS OF THE TEST BACK TO THE TIME WHEN THE DEFENDANT WAS DRIVING HIS AUTOMOBILE.

The prosecution's expert witness admitted that the breathalyzer results only tell the quantity that is in the blood stream at the time the test was given. It in no way, by itself, tells what the amount of alcohol in the breath was, say, forty-five minutes later. It is the appellant's contention that the failure of the prosecution to extrapolate the results back to the time the appellant was driving his automobile rendered the results inadmissible in a prosecution for driving under the influence of intoxicating liquor. The evidence in this case tended to show that the appellant had had two "screwdriver highballs" over a period of about half an hour—finishing the last drink approximately twenty minutes prior to the time of the accident. The state's expert witness on the breathalyzer also stated that you would not reach an equilibrium (that point where you are absorbing alcohol into your blood stream at the same rate as you are dissipating it) until about forty-five minutes after you have consumed the last drink. Prior to this time the alcohol content in your blood will be rising. There was no in-

formation placed into evidence however which would enable the court to make any decision as to the degree of intoxication at the time the defendant was driving the automobile.

The best way, although not the only way by any means, that the prosecution could have extrapolated the results back would have been to have produced a chart into evidence by their expert witness, or some other source, showing what amount of alcohol would have been absorbed into the blood twenty minutes after the last drink in comparison to the amount in the system (for the amount of alcohol consumed—considering the build of the appellant, the amount of food in his stomach, etc.) sixty-five minutes after the last drink. This would have adequately overcome the problem of extrapolating the results back but, since the prosecution utterly failed to do so, the court should not have based its decision on the results of the breathalyzer test and, in doing so, the court created prejudicial error to the appellant.

POINT III

THE DISTRICT COURT ERRED IN ALLOWING THE RESULTS OF THE BREATHALYZER TEST TO BE ADMITTED INTO EVIDENCE SINCE THE TEST WAS THE RESULT OF COERSION AND WAS, THEREFORE, TAKEN IN VIOLATION OF U.C.A. 41-6-44.10 AND THE APPELLANT'S CONSTITUTIONAL RIGHTS AGAINST SELF INCRIMINATION.

The Utah Code Annotated 41-6-44.10 states, " . . . If such person has been requested to submit to any one of the above chemical tests and refuses to submit to such chemical test, the test shall not be given. . . " Under this statute, then, the defendant was not to be forced into taking such a test. The appellant contends that by informing him that if he refused to take the test his license would be taken away he was, in reality, coerced into taking the test. Such coercion would vitiate any such consent which would be necessary to give such a test

Compton v. State, Colo., 444 P. 2d 263 (1968) involved a similar state statute which provided, "no person shall be required to take a blood alcohol test without his consent." In that case the appellant moved to suppress the results of the blood alcohol test and the court pointed out, "it was proper for the trial judge to resolve the matter as to the 'voluntariness' of the blood alcohol test along the same procedural lines as would be followed in determining the admissibility or nonadmissibility of a confession." at 265. The court further explained that, "The error of the trial court occurred when it thereafter submitted to the jury the results of the blood alcohol test without having first determined that consent to the taking of the test was given by the defendant." Thus, under a similar statute, it has been held that consent must be obtained and it must be a "voluntary consent", unlike the coerced consent as in the case at bar. It is true that you can take a person's license away from him if he doesn't take the breath test. The point here is,

rather, that by telling him he is going to lose his license if he does not comply, most assuredly vitiates any "consent" to take one of the tests.

This case also involves a violation of the appellant's constitutional rights against self-incrimination under the Utah Constitution Article 1, Section 12 which states, " . . . The accused shall not be compelled to *give evidence* against himself . . . " (emphasis ours). This differs substantially from the United States Constitution, Fifth Amendment which states, " . . . nor shall be compelled in any criminal case to be a *witness* against himself . . . " which is a near duplicate of the California Constitution Article 1, Section 13, Clause 5 which states, "nor be compelled in any criminal proceeding to be a witness against himself". Thus the Supreme Court of the United States in *Schmerber v. California,* 384 U.S. 757, 86 Sup. Ct. 1826, 16 L. Ed. 2d 908 (1966) was not considering a statute such as that in Utah's Constitution and their holding that a blood test does not fall under the category being a "witness" against oneself (which implies only the *spoken* word) is not binding in Utah since here he cannot even be compelled to give "evidence" against himself. However, the appellant in the case at bar was compelled to give evidence against himself in violation of the Utah Constitution since he was told by the arresting officer that if he did not take the test his license would be taken away.

Texas and Oklahoma, the two leading states in the area of admissibility of compelled evidence of intoxication, both have constitutional articles like Utah's. The Texas Constitution Article 1, Section 10 states, " . . . He shall not be compelled to give evidence against himself . . . " and the Oklahoma Constitution Article 2, Section 21 states, " . . . No person shall be compelled to give evidence that will tend to incriminate him. . . " Both states have generally held that tests to discern the degree of intoxication in a person fall within the category of "evidence" and if the evidence is not given freely, with knowledge of his rights to refuse, such evidence may not be considered by the court as, in any way, tending to show intoxication of the defendant.

The leading Texas case of *Apodaca v. State,* 140 TexCr.R. 593, 146 S.W. 2d 381 (1940) involved a urine test which was given to the defendant without his consent. The court held that this was a violation of the Texas Constitution Artcile 1, Section 10, supra, since demonstration by an act or non-oral evidence involving self-incrimination is as obnoxious to the constitution as self-incrimination by words.

Several cases have also arisen in Oklahoma under their Constitutional Article 2, Section 21, supra. *Cox v. State*, Okla. Cr., 395 P. 2d 954 (1964) involved two tests given to the defendant to ascertain if he were under the influence of alcohol. In that case, the court pointed out

that the state constitutional provision against compelling the accused to give evidence which will incriminate him includes real as well as oral testimony. The court further stated that if it were found that the tests on the defendant were not freely, knowingly, or voluntarily made on the part of the defendant then the jury must disregard such tests and results thereof as affording any evidence against him. *Spencer v. State,* Okla. Cr. 404 P. 2d 46 (1965) and *Stewart v. State* Okla. Cr., 435 P. 2d 191 (1967) followed the *Cox* case where evidence of films taken of the defendant while performing tests under the direction of the police without the knowledge or consent of the defendant was not allowed. In the case at bar, where the appellant was coerced into taking the breathalyzer test, the results should have been disregarded by the court. By using the tests as the primary basis for a finding of driving while under the influence of intoxicating liquor, prejudicial error was committed.

CONCLUSION

The conviction for driving under the influence of intoxicating liquor should be reversed since prejudicial error was committed in allowing the results of the breathalyzer to be the basis of a conviction for "drunk" driving in this case. The results should have been disregarded for three basic reasons: A proper foundation was not laid for the results of the breathalyzer; the prosecution failed to extrapolate the results back to the time

when the appellant was driving his automobile; and the test was conducted only after the appellant was coerced into taking it by a threat that his license would be taken away if he didn't take the test—violating Utah Code Ann. 41-6-44.10 and his rights against self incrimination under the Utah Constitution. Thus, the conviction should be reversed and this court should decide in this case of first impression, that the breathalyzer test as conducted in this case was inadmissible, invalid, and unconstitutional.

Respectfully submitted,

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